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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1184

NORMAN BENNETT,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Norman Bennett, respectfully prays for writ of certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on January 6, 1966.

OPINION BELOW

No opinion was issued below. The judgment of the Court of Appeals, without opinion, is attached as an appendix hereto.

JURISDICTION

This case involved a complaint for invasion of privacy. On March 17, 1965, the United States District Court for the District of Columbia granted defendant's motion for summary judgment.

On January 6, 1966, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court. This decision of the Court of Appeals was made by two judges of the presiding panel; senior presiding Judge Fahy did not participate in this decision.

The jurisdiction of this Court is invoked under 28 U.S. Code § 1254(1).

QUESTIONS PRESENTED

Where a veteran is engaged in civil litigation with a corporate defendant,

1. May the veteran's military service records, which are declared confidential and privileged by Federal statute and regulation, be examined with impunity by such corporation, over the veteran's objections?

2. Does the veteran have a cause of action for an unconstitutional invasion of his privacy, where his confidential military service records are gained access to by such corporation over the veteran's objections?

STATUTORY PROVISIONS

The following regulations, promulgated under authority of Title 5, U.S. Code, § 1002, appear in Title 32, Code of Federal Regulations:

> Section 701.1(c) *No access:* Without limiting the discretion vested in the Secretary of the Navy by the other provisions of this rule, access will not be granted to: (1) Material classified "confidential."

Section 701.1(e) *Service Records:* Officers' and enlisted members' service records are deemed *confidential* for good cause found within the meaning of this rule except to persons properly and directly concerned, including the serviceman himself, and personal representatives of the serviceman; etc., executors, guardians, etc., who present proper proof thereof.

Section 701.2(a) *Authorization Required:* Unless authorized by the Secretary of the Navy or his designee, persons in the Naval Service and civil employees are prohibited from releasing or producing, in response to Subpoenas Duces Tecum, motions for discovery, or in answer to interrogatories or otherwise, any official records or copies thereof, including the records described in paragraph (b) of this section or classified matter, in a civil court, or in connection with preliminary investigations by attorneys or others . . . .

Section 701.2(b) *Records of Courts Martial and Investigations:* The records of proceedings of Navy Courts Martial, Courts of Inquiry, boards of Investigation, and the records of investigations and administrative reports are intended solely for use in the Naval Establishment and are privileged.

Section 701.2(c) *Production of official records in response to Court Order;* Except as noted in paragraph (d) of this section, in cases where naval records are desired by or on behalf of litigants and where records are not classified or of privileged and confidential status as described in paragraph (b) of this section, such parties will be informed that the procedure for production of the records desired . . . is to obtain . . . a court order calling for the particular records desired.

STATEMENT OF THE CASE

While petitioner, a Navy veteran, and respondent were engaged in civil litigation, respondent mailed to the Navy Department a Subpoena Duces Tecum, seeking the production in Court of petitioner's military service records. Then, prior to the date called for in the subpoena, respondent's representatives appeared before the Naval Of-

ficer who had physical custody of such records. The alleged purpose of such visit was to determine which records should be produced in Court. Instead, respondent's representatives demanded, and, over the objection of petitioner's counsel, were allowed access to such records. Respondent's agents examined such records thoroughly and dictated to an employee notes concerning such records.

Revealed were certain derogatory reports, embarrassing details of certain aspects of petitioner's military service, reports of boards of investigation, etc. These records were in no way relevant to the pending litigation, were confidential and privileged under the provisions of the Code of Federal Regulations, and their disclosure caused petitioner embarrassment and mental anguish.

Information gained by respondent from such records were even used by respondent, in a motion for summary judgment, filed in the instant action, to make unfounded and malicious insinuations that the petitioner had sought to recover in certain personal injury actions for injuries actually sustained while in the service.

Petitioner thereupon filed an action against respondent for invasion of privacy. Respondent's motion for summary judgment was granted. This action was affirmed by two judges of the three-judge panel of the Court of Appeals.

REASONS FOR GRANTING WRIT

1. The holding in this case, if not reversed, provides precedent and authority for the proposition that a veteran's military service records may be examined with impunity, if such veteran is involved in litigation, despite the fact that Federal Regulations specifically declare such records as confidential and privileged and immune from scrutiny.

2. The holding, in this case, if not reversed, destroys the individual's constitutional right to privacy, if such in-

dividual happens to be involved in litigation, despite the fact that the invasion of his privacy is in no way pertinent to the pending litigation, but probes into privileged matters.

3. The holding in this case controverts other rulings of Federal courts which protect such records and the right to privacy thereof.

4. The holding in this case endangers the privileged and confidential status of government records, despite the intent of Federal statute and regulations to safeguard such records.

ARGUMENT

The right of an individual to file an action at law for invasion of privacy has been specifically recognized in the District of Columbia, in the case of *Bernstein v. National Broadcasting Company*, 129 F. Supp. 817, aff'd, 98 U.S. App. D.C. 112, 232 F.2d 369. That case held that the gravamen of an action for invasion of privacy is "the wrongful intrusion into one's private activities." Such definition precisely describes the activity of respondent in the instant case.

The inviolability of such records, as involved herein, has been specifically declared in other decisions. Thus, in *Harris v. Walsh*, 51 App. D.C. 167, 277 Fed. 569, it was held that Selective Service Records are confidential and may not be produced in Court.

In *Bayarsky v. Brooks*, 51 F. Supp. 974, the Court refused to compel production of Justice Department records where departmental regulations made such records confidential. In *Fed. Life Ins. Co. v. Holod*, 30 F. Supp. 713, a party's World War Draft records were held confidential and not subject to production in Court.

Likewise, in *Castellano v. Penn Reading Seashore Lines*, 15 F.R.D. 276, the Court held that ICC records, which were made confidential by department regulations,

could not be produced for inspection. See also *United States v. Caserta*, 199 F.2d 905, in which a conviction for income tax evasion was reversed because of the introduction into evidence of defendant's Selective Service Records because, "It has uniformly been held that a third party cannot compel the production of these (records) unless the registrant consents."

In addition to these case rulings, the provisions of the Code of Federal Regulations, cited *supra*, specifically prohibited any access to such records. Notwithstanding the foregoing, the effect of the ruling in this case has been to destroy completely the confidential nature of such records and to allow respondent to pry into the same with impunity.

Petitioner has learned that, because of the ruling in this case, the American Legion, Department of the District of Columbia, has prepared a Resolution recommending: (a) that the American Legion declare its support of all Federal Regulations providing for strict enforcement of the right of privacy of veterans' files and records; (b) that the American Legion take any necessary action to safeguard such rights; (c) that the American Legion seek to file a brief as Amicus Curiae in this matter.

CONCLUSION

Recent disclosures before Senatorial Investigation Committees have revealed the arrogance and ruthlessness of large and powerful corporations in harassing individuals who may be involved in litigation with such corporations, and in violating their rights of privacy. The actions of respondent herein further exemplified the contempt with which such corporations view individual rights and Federal regulations which seek to protect such rights.

In view of all the foregoing, petitioner submits that not only were his individual rights violated, but that the ruling in this case endangers the rights of all veterans and the sanctity of confidential and privileged records.

Petitioner therefore respectfully submits that this petition for writ of certiorari should be granted.

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CERTIFICATE OF SERVICE

Copies of the foregoing Petition mailed this 1st day of April, 1966, to Steptoe & Johnson, Shoreham Building, Washington, D. C., attorneys for respondent.

_____
Samuel Intrater

APPENDIX

[Filed January 6, 1966]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,370 September Term, 1965.

Norman Bennett, Civil 2520-64

Appellant,

v.

Ford Motor Company,
a corporation,

Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Fahy, Burger and McGowan, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment — of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant its taxable costs on this appeal, and have execution therefor.

Per Curiam.

Dated: JAN 6 - 1966

Circuit Judge Fahy did not participate in the decision of this case.